the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, PETITIONER

v.

KLIN JONES, COMMISSIONER OF THE BUREAU OF ENUE OF THE STATE OF NEW MEXICO, ET AL.

TION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

ANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Solicitor General, on behalf of the United , submits this memorandum *amicus curiae* in of the petition for a writ of certiorari.

QUESTIONS PRESENTED

Whether the State of New Mexico has authority ose a gross revenue tax on the income from a sports and resort facility financed by the Fed- overnment and operated by the Mescalero Tribe on government land leased to the Tribe.

Whether the State of New Mexico has author- impose a tax on personal property owned by be and used in connection with the facility d on the leased land.

-550—72——1

INTEREST OF THE UNITED STATES

The New Mexico Court of Appeals has held that the State of New Mexico (1) has the right to tax the petitioners as a tribe for revenue produced under federal supervision on federally owned tax-exempt land and (2) to impose a use tax on personal property used by the Tribe on the land. The imposition of these state taxes is detrimental to important federal programs for Indian economic betterment and, in our view, is contrary to congressionally granted rights and immunities of the tribes.

STATEMENT

The essential facts were stipulated below (App. A, *infra* pp. 11–16).

The Mescalero Apache Tribe[1] leased for 30 years from the United States 80 acres in a national forest adjacent to the Tribe's Reservation for the purpose of developing and operating a winter sports and resort facility (App, *infra*, pp. 11–12). The rental under the lease, the price of equipment and the construction of the resort were all financed with money loaned to the Tribe by the government under the authority of 25 U.S.C. 470 (*id.* at 12–13). The Tribe

[1] The Tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476. That far-reaching Act, 25 U.S.C. 461 *et seq.*, was designed, *inter alia*, to halt alienation of Indian land, to provide land for the Indians, and to stabilize tribal organizations. See U.S. Department of the Interior, *Federal Indian Law*, 128–129 (1958). Both 25 U.S.C. 470, under which the government made the present loan, and 25 U.S.C. 465, which provides a broad tax exemption, are provisions of the Indian Reorganization Act.

built and operated the resort as directed by the terms of the lease and under supervision of the Department of the Interior (*ibid.*). The basic purpose of the resort is to provide revenue to be used for the educational, social and economic welfare of the Tribe (*id.* at 12). The resort also provides job training and jobs for some 20 to 30 members of the Tribe (*ibid.*).

The Enabling Act for New Mexico, Section 2, Clause Second, 36 Stat. 557, 558–559, prohibits the state from taxing "lands or property" belonging to the United States, or hereafter "acquired by the United States or reserved for its use." The Act further provides that nothing therein "shall preclude the said State from taxing, as other lands and other property are taxed, any land and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands * * * as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

25 U.S.C. 465, under which the Tribe acquired the leasehold interest in the national forest lands in question, provides that "such lands or rights shall be exempt from State and local taxation."[2]

The State of New Mexico imposed on the Tribe two taxes of general application as a result of the Tribe's operation of the resort:

1. A tax on the privilege of doing business of 2 percent of annual gross receipts. The Tribe

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[2] The statutes involved are more fully set forth at Pet. 3–5 and Pet. App. C.

paid under protest to the State $26,086.47 for the period from October 1, 1963, through December 31, 1966, and filed a demand for refund.

2. A tax on the storage, use or consumption of personal property in the amount of $5,887.19 plus penalties and interest based on the sales price of materials used to construct two ski lifts at the resort. This tax was not paid but was protested. [App., *infra*, pp. 13–15.]

The protest and claim for refund were denied by the Commissioner of Revenue of the State of New Mexico (Brief in Opp. 2). The matter was appealed to the Court of Appeals of the State of New Mexico which affirmed, on divided grounds, the decision of the Commissioner of Revenue (Pet. App.). A motion for rehearing was denied and a timely petition for writ of certiorari was filed with the Supreme Court of the State of New Mexico, which denied the petition (Brief in Opp. 2). A timely petition for a writ of certiorari was then filed in this Court.

ARGUMENT

So far as we are able to determine, this case presents the first attempt by a state to tax an Indian tribe as a tribe on the revenues produced by the use of tax-exempt tribally held lands. The question of state authority in this area is of national importance because of the serious detrimental effect such taxes can have on the economic well being of Indian tribes and on major federal programs intended to encourage Indian economic development. The decision below, we submit, upholds an unauthorized extension of state

jurisdiction to tax which would unwarrantably interfere with these federal programs, and review by this Court is therefore appropriate.

1. The State apparently does not contend that it is empowered to impose a tax directly on the land involved in this case or on the Tribe's leasehold interest in the land. Indeed, there is no judicial authority upholding state taxation of land owned by the federal government or of a leasehold interest in such land where the lessee is an Indian tribe. Here title to the land on which the resort is located is in the federal government (App. 12), and the leasehold right of the Tribe is specifically exempted from taxation under 25 U.S.C. 465. Moreover, the exemption under 25 U.S.C. 465 is fully consistent with the New Mexico Enabling Act, *supra*, which provides that new lands may be acquired for the Indians under "any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe". 25 U.S.C. 465 provides just such a tax exemption.

For present purposes it is of no consequence whether the land in question was original reservation land, or land later acquired by the government or made available by the government for tribal use. The purpose of 25 U.S.C. 465 and 470 is to allow acquisition of additional land or rights in land for the benefit of Indians or Indian tribes. *Stephens* v. *Commissioner of Revenue*, Nos. 26193, 26281, C.A. 9, decided November 20, 1971; see also *United States* v. *Rickert*, 188 U.S. 432, 437. Moreover, "[l]ands which are occupied by a tribe or tribes of Indians have always

been regarded as not within the jurisdiction of the States for purposes of State property taxation," U.S. Department of the Interior, *Federal Indian Law*, at 850. See *The Kansas Indians*, 5 Wall. 737, 755–757; *The New York Indians*, 5 Wall. 761, 771; *United States* v. *Rickert*, 188 U.S. 432, 437.

2. Early cases considered both the Indian tribes and their *lessees* exempt from state taxation of Indian land or income produced from such land. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522; *Gillespie* v. *Oklahoma*, 257 U.S. 501. The immunity from taxation of lessees of the government was overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, but the immunity of the government itself, or here, the Indian tribe was not overruled. Thus, this Court in *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 353, in holding that Oklahoma could impose various taxes on the Texas Company based on production from Indian lands, carefully pointed out: "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land." *Federal Indian Law*, *supra* at 853, sums up the changes that have thus occurred in the federal instrumentality doctrine as follows:

> There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, insofar as it relates to Indians, their property, and their affairs, remains unchanged. ***For just as the right to tax the lessee of State lands does not include the right to tax the State itself, so the right to tax***

the lessee of Indian lands does not imply a right to tax the Indians or their property. [Emphasis added.]

This long-established distinction is reflected in the federal exemption statutes at issue in the present case. Properly interpreted, we submit, the exemption conferred by 25 U.S.C. 465 applies not only to taxes imposed on the Tribe's leasehold and other interests in real property, but also to taxation of the proceeds derived by the Tribe from the use of their real property. For the basic purpose of the tax exemption is to enable the land reserved for the Indians' use to serve as a tax-free base for their economic support and well being. Indeed, in the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from Indian lands, it has done so by means of carefully delimited, specific legislation. For example, 25 U.S.C. 398 specifically authorizes the states to tax mineral production on unallotted tribal lands as if produced on unrestricted land. Since there is no such authorization for the New Mexico gross receipts tax at issue here, it is in our view barred by 25 U.S.C. 465. See *Squire* v. *Capoeman*, 351 U.S. 1. *Stephens* v. *Commissioner of Revenue*, *supra*.

1 For similar reasons, we believe that the federal statutory exemption applies also to the imposition here of New Mexico's use tax. In *United States* v. *Rickert*, *supra*, decided by this Court in 1903, the State of South Dakota attempted to collect a tax on permanent improvements that individual Indians had placed on their allotted lands and on personal

property used by the Indians in farming the land. In a suit brought by the United States to enjoin the collection of the tax, this Court held that even though South Dakota may not classify the improvements as part of the realty "[t]he fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States" 188 U.S. at 442. As to cattle, horses and other property of like character, the Court said (188 U.S. at 443):

> * * * The personal property in question was purchased with the money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

See also *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685.

A fortiori, where the undertaking is a tribal one, it is proper to construe the applicable federal statutory exemption, which was designed for the Indians' economic betterment, to bar state taxation of the personal property used by the Tribe for the improvement of tribal land. As petitioner correctly states (Pet. 7): "Tribal property was not subject to state taxation when the horse and plow were utilized for economic

development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented warrant review by this Court and the petition for a writ of certiorari should be granted.

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Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.

FEBRUARY 1972.

APPENDIX

Before the Commissioner of Revenue State of New Mexico

In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14–703019–00, Against Bureau of Revenue Assessment No. 96224 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

STIPULATION OF FACTS[1]

The Mescalero Apache Tribe, hereinafter called "Tribe" and the Bureau of Revenue, State of New Mexico, hereinafter called "Bureau" hereby stipulate and agree, through their respective attorneys, as follows:

1. That the Tribe is an Indian Tribe which has a Treaty with the United States of America, a copy of which Treaty is marked Exhibit 1, attached hereto and incorporated herein by reference as if set forth in full.

2. That certain lands in Lincoln and Otero Counties of the State of New Mexico have been set aside as a reservation for the Tribe and on which the Mescalero Apache people reside and tribal business is primarily conducted.

3. Pursuant to 25 U.S.C.A., Section 476, the Tribe, in 1934, adopted a Constitution, a copy of which is

[1] In this appendix the attachments to the stipulation of facts are omitted.

marked Exhibit 2, attached hereto and incorporated herein by reference as if set forth in full.

4. Sierra Blanca Ski Enterprises is a ski resort located in Otero and Lincoln Counties, New Mexico, and is exclusively owned and operated by the Tribe. The ski resort is on lands belonging to U.S. Forest Service which have been leased to the Tribe for a period of thirty (30) years. The ski resort area is bordered on the south by the Tribe's reservation and some of the cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation. That a map of said area is marked Exhibit 3, attached hereto and incorporated herein by reference. The Sierra Blanca Ski Enterprises, including the lease with the U.S. Forest Service, was entered into by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution which is referred to in paragraph 3, above.

5. The enterprise at Sierra Blanca was entered into by the Tribe after a feasibility study was made by the Bureau of Indian Affairs of the United States of America, which feasibility study was paid for by the federal government.

6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is to be used and is being used for the educational, social and economic welfare of the Mescalero Apache people. The ski resort also provides a job training center for the Mescalero Apache people and approximately 20 to 30 Mescalero Apache people are employed at the ski resort in a job training capacity.

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

8. The approval of the Bureau of Indian Affairs of the Department of the Interior of the United States is required in several areas of the operation at the ski resort. For example, the approval of the Bureau of Indian Affairs must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

9. The Bureau conducted an audit in May of 1968 which resulted in Assessment No. 96224 being issued against the Tribe for compensating tax in the amount of $5,887.19, plus interest of $893.82 and penalties of $[illegible].73, a copy of which assessment is marked Exhibit [illegible] attached hereto and incorporated herein by reference. The assessment can be broken down for the following periods: For September 1, 1963, to December 31, 1965, principal—$4,925.01; penalty—$492.50; interest $232.89. For January 1, 1966, to April 30, 1[illegible], principal—$962.18; penalty—$96.23; interest $[illegible].92. The assessment can also be broken down as follows: For September 1, 1963 to August 31, 1965,

principal—$776.74; penalty—$77.67; interest—$167.97. For September 1, 1965 to April 30, 1968, principal—$5,110.45; penalty—$511.05; interest—$725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

10. All the materials against which the compensating tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

11. The plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government as evidenced by the letter to Mr. Wendell Chino, dated October 12, 1965, a copy of which letter is marked Exhibit 5, attached hereto and incorporated herein as if set forth in full.

12. As a result of such assessment, the Tribe filed a written protest, a copy of which is marked Exhibit 6, attached hereto and incorporated herein by reference as if set forth in full. The written protest was timely filed by the Tribe as required by Section 72-13-38 of the Tax Administration Act. The written protest is hereby amended to include the additional ground on which the Tribe protests the assessment, namely the assessment is barred by the Statute of Limitations and that the Tribe is allowed to raise this defense at the hearing on its Protest of the Assessment.

13. That in December of 1967, the Tribe received the attached letter, marked Exhibit 7, and that such

letter was written by the then Chief Counsel of the Bureau and that said letter is incorporated herein as if set forth in full. That in April of 1968, the Tribe received the attached letter marked Exhibit 8, and that such letter was written by the then General Counsel of the Bureau and that said letter is incorporated herein as if set forth in full.

14. That during the period of October 1, 1963, through December 31, 1965, the Tribe paid $15,529.69, and during the period of January 1, 1966, through December 31, 1966, the Tribe paid $10,556.78 in taxes to the Bureau on gross receipts received from its operation at the ski resort. That said sum was paid under the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A. 1953 Comp.

15. That a Claim for Refund of the Emergency School Taxes paid was filed by the Tribe on December 31, 1969; a copy of said Claim for Refund is marked Exhibit 6, attached hereto and the Claim for Refund, if set for in full. That by letter dated January 19, 1970, the Tribe's Claim for Refund was denied and within thirty (30) days from this denial, the Tribe filed a written request for a hearing on its Claim pursuant to Section 72-13-38, N.M.S.A. 1953 Comp.

16. That the Tribe's Petition of Protest, being Exhibit 6, attached hereto, and the Claim for Refund, being Exhibit 9, attached hereto, be consolidated and heard at the same administrative hearing, and that at such administrative hearing, the facts and statements contained in this Stipulation shall be treated as having been conclusively established by competent evidence and all such facts and statements shall be applicable to both the Petition of Protest and the Claim for Refund.

17. That it is understood the allegations and theories raised in the Petition of Protest and the Claim for

Refund, being Exhibits 6 and 9 respectively, are to be considered as being the theories and allegations relied on and asserted by the Tribe at the administrative hearing to be held on this matter, but that the statements and facts contained in the Petition of Protest and the Claim for Refund are not stipulated to by the Bureau except as such statements and facts are established by this Stipulation.

18. That C. L. Sonnichsen is a recognized authority on the Mescalero Apache people and that his book entitled *The Mescalero Apaches*, published in 1958 by the University of Oklahoma Press at Norman, Oklahoma, is an accurate recording of factual events concerning the Mescalero Apache people and that judicial notice may be taken of the facts stated therein.

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By S. THOMAS OVERSTREET,
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ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,
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U.S. GOVERNMENT PRINTING OFFICE: 1975

IN THE

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MESCALERO APACHE TRIBE, *Petitioner*

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, AND THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*

RESPONDENT'S RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Attorney General of the State of New Mexico submits this response to the Memorandum for the United States *Amicus Curiae*.

QUESTIONS PRESENTED

The respondent is dissatisfied with the presentation of the questions by both the Petitioner and the United States as *amicus curiae*. Under numbered question one, the tax is referred to as " a gross revenue tax on . . . in-

come"; however, the tax is a gross receipts tax on gross receipts. Under numbered question two, the tax is referred to as "a tax on personal property"; however, the tax is a compensating or use tax imposed on the use of tangible personal property.

STATEMENT

The statement of the case by the United States as *amicus curiae* is inaccurate in its reference to the rate of the emergency school tax which was imposed on the Petitioner. (Memorandum Brief 3) The rate of the tax was 3 percent rather than 2 percent. New Mexico Laws of 1963, ch. 325, Sections 6 and 8.

Respondent also contends that the portion of the statement on page 3 of the memorandum of the United States as *amicus curiae* which states:

> "25 U.S.C. 465, under which the Tribe acquired the leasehold interest in the national forest lands in question . . . ."

is an inaccurate statement of fact not supported by the record in this case.

ARGUMENT

The United States has argued that the taxes imposed on the Petitioner can have a serious detrimental effect on the economic well being of Indian tribes and on major federal programs intended to encourage Indian economic benefit. The nature of the detrimental effect is not explained. The imposition of taxes such as those at issue here, may increase the financial burden of any business; however, the imposition of an increased financial burden even if that burden eventually falls

n the United States does not, by itself, vitiate a state ax. See *United States* v. *City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed. 2d 424 (1958). There is no showing by the United States of how the imposition of these taxes will interfere with federal programs intended to encourage Indian economic development, and there is no reason to suppose that this will be the result.

1. The United States argues that the leasehold right of the Tribe is specifically exempted from taxation under 25 U.S.C. § 465. The last paragraph of § 465 states:

> "Title to any lands or right acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust *for* the Indian tribe or individual Indian *for which the land is acquired*, and such lands or rights shall be exempted from State and local taxation." (emphasis supplied)

The land upon which Petitioner's ski resort was located belonged to the United States Forest Service and was leased by the United States Forest Service to Petitioner. (Memorandum Brief, Appendix 12.) The title to the land was apparently in the federal government prior to the time the lease with Petitioner was entered into. The land was not *acquired for* Petitioner. If title to the leasehold interest was taken in trust for the Petitioner, the United States would have taken leasehold interest in its own land, in trust for Petitioner. Respondent contends that the record in this case does not indicate that any lands or rights were "acquired" for the Petitioner which could be taken in the name of the United States in trust for the Petitioner because the United States already had title to

these lands or rights. For this reason, Section 25 U.S.C. § 465 is irrelevant to this case.

If Section 25 U.S.C. § 465 is applicable, its application is limited to exempting lands or rights to land from State or local taxation, and the taxes at issue here are not imposed upon Petitioner's land or rights to land. As the New Mexico Court of Appeals stated in its opinion:

> "...The tax involved here applies neither to land nor to rights acquired in land. The tax under the old 'compensating or use tax' is on tangible personal property, see § 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See § 72-16-14.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see *Edmunds* v. *Bureau of Revenue,* 64 N.M. 454, 330 P.2d 131 (1958)...." *Mescalero Apache Tribe* v. *Jones,* 83 N.M. 158, 489 P.2d 666, 669 (Ct. App. 1971).

2. The United States contends that Section 25 U.S.C. § 465 should be interpreted as an exemption from taxation, "... of the proceeds derived by the Tribe from the use of their real property...." (Memorandum Brief, 7) The general rule is that exemptions to tax laws should be clearly expressed. See *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U.S. 418, 420-21, 55 S.Ct. 820, 822, 79 L.Ed. 1517, 1519 (1935); *Squire* v. *Capoeman,* 351 U.S. 1, 6, 76 S.Ct. 611, 615, 100 L.Ed. 883, 889 (1956); *Holt* v. *Commissioner of Internal Revenue,* 364 F.2d 38 (8th Cir. 1966), cert. denied 386 U.S. 931, 87 S.Ct. 952, 17 L.Ed. 2d 805. The interpretation suggested by the United States is far beyond the clear expression of the exemption 25 U.S.C. § 465 and would cause that sec-

tion to be in conflict with the Enabling Act for New Mexico, 36 Stat. 557, Section 2, Clause 2. That clause of the Enabling Act states in part:

> ". . . ; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands or other property outside of an Indian reservation owned or held by any Indian, save and except such *lands* as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such *lands* shall be exempt from taxation by said State so long and to such extent as the Congress has prescribed or may hereafter prescribe." (emphasis supplied)

The Enabling Act grants the state the power to tax lands and other property outside an Indian reservation but it excepts and exempts after-acquired *lands* which are granted or confirmed to Indians to the extent Congress may prescribe. The type of tax referred to is a tax on land. Even if 25 U.S.C. § 465 has extended this type of tax to include a tax on rights in land, it clearly has not exempted from tax the privilege of engaging in business or the use of tangible personal property. The doctrine of remedial legislation should not be stretched to expand the reach of a statute of such evident limited purposes as 25 U.S.C. § 465. *Cf. United States* v. *Zacks,* 375 U.S. 59, 84 S.Ct. 178, 11 L.Ed.2d 128 (1963).

3. The United States argues that the compensating tax should not be imposed on Petitioner's use of tangible personal property and relies on *United States* v. *Rickert,* 188 U.S. 432, 28 S.Ct. 478, 47 L.Ed. 532 (1903). The *Rickert* case concerned a tax on tangible personal

property, not a compensating or use tax. A tax upon the use of property is not a tax upon the property itself. See *United States* v. *City of Detroit, supra; Agua Caliente Band of Mission Indians* v. *County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), U.S. cert. denied February 22, 1972. The primary purpose of the compensating tax at issue here was "... to protect, so far as is practicable, the merchants, dealers and manufacturers of New Mexico who operate under the excise tax laws of this state, and who meet the requirements of such laws, against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of goods, wares and merchandise." The New Mexico Laws of 1939, ch. 95, § 1 [§ 72-17-2, N.M.S.A. 1953, repealed July 1, 1967].

The tangible personal property purchased by Petitioner was purchased with money loaned to Petitioner by the United States. (Memorandum Brief, Appendix 13) It was not issued by the United States to an allottee as in the *Rickert* case; and it was not, in fact, the property of the United States at the time the compensating tax was assessed on its use.

Respondent contends the exemption provided by 25 U.S.C. § 465 has no application to the compensating tax at issue here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RESPONSE OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Petitioner submits this Memorandum pursuant to a request by the Court to respond to the Memorandum for the United States as Amicus Curiae.

Argument

The concern expressed by the United States as Amicus is the same as that of the Petitioner - that state taxation of an Indian tribe on the revenues produced by the use of tax exempt tribally held lands is detrimental to the economic well-being of the Indian tribe and jeopardizes federal programs encouraging Indian economic development. The decision of the New Mexico Court of Appeals authorizes the state to tax such tribal interests, contrary to federal programs, regulations and statutes.

1. Both the Enabling Act, June 20, 1910, 36 Stat. 557, Ch. 310, Sec. 2 Cl. 2, and 25 U.S.C. 465 are federal statutes enacted to [illegible] tribal lands from the action of the state. To protect the tribes, these statutes exempt tribal lands from state taxation, leaving the change of such a status in the hands of Congress. A review of the Indian Reorganization Act of 1934 indicates a federal control over Indian activities and an expressed policy of fostering Indian economic development.

The stipulation of facts in the present case (T. 5-9) shows tribal economic development under the watchful eye of the federal government. The tribe did not enter this economic enterprise until the Bureau of Indian Affairs had conducted a feasibility study; such federal assistance and control has continued throughout the development of this tribal ski enterprise.

Stephens v. Commissioner of Revenue, Nos. 26193, 26331, C. A. 9, decided November 30, 1971, is illustrative of the protection 25 U.S.C. 465 affords Indians. That case involved federal income tax, but reiterates that the exemptions of 25 U.S.C. 465 apply to lands acquired pursuant to the Indian Reorganization Act. In the present case, funds available under 25 U.S.C. 470 are specifically referred to in 25 U.S.C. 465 and are applicable to tribes organized under 25 U.S.C. 476. As indicated in the *Stephens* case, statutes and regulations dealing with Indians must be read in pari materia.

The position of the United States reiterates the stand of Petitioner in that existing federal regulations and statutes have blocked the state from applying its taxes to Indian held lands.

2. The Petitioner feels the 25 U.S.C. 465 exemption applies to the taxation of the proceeds derived from the use of the ski area for the economic benefit of the tribe. 25 U.S.C. 465 does not say specific state taxes but seems all inclusive in stating "... and such lands or rights shall be exempt from State and local taxation." Further, the language and intent of 465 is to any interests in lands and does not limit it to ski areas. Petitioner would suggest the broad scope of 465 is to open the door for various types of economic development, not limiting these as to use or location. The factor to be considered is whether such economic development is for the benefit of the tribe.

Such a policy places the burden on the state to show how its tax can be applied to a tribal activity protected by federal statutes. *Squire v. Capoeman*, 351 U.S. 1; *United States v. Rickert*, 188 U.S. 432; *Stephens v. Commissioner of Revenue*, supra.

United States v. Rickert, supra., indicates that the federal exemption applies to the imposition in the present case of the New Mexico Use Tax, Section 72-17-3, N.M.S.A., 1953 Comp. Again, the state is precluded because such a tax would interfere with established federal Indian policies of economic development through federal controls. The facts in the present case show the federal government has been involved in each step of the ski resort's development, all to the exclusion of the State of New Mexico.

Conclusion

The Amicus Curiae Memorandum of the United States endorses the propositions presented in the Petition for a Writ of Certiorari, and is another expression of federal concern for the economic development of Indian tribes. Petitioner and other tribes are on the road to economic self-sufficiency, but have a long way to go in reaching that goal. That goal can only be reached through continued federal assistance as outlined in the Indian Reorganization Act of 1934, and controls that exempt the state from encumbering this effort.

Respectfully submitted,
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March, 1972